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In the Supreme Court of the United States

OCTOBER TERM, 1992

THE HONORABLE EVAN BAYH, GOVERNOR OF THE STATE OF INDIANA, and THE HONORABLE KATHY PROSSER, COMMISSIONER OF THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,

Petitioners,

v.

GOVERNMENT SUPPLIERS CONSOLIDATING SERVICES, INC., and JACK CASTENOVA, INC.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE PETITION

The Indiana statutes on backhauling and vehicle registration and labeling impose exactly the same rules on both interstate and local shipments of trash. The district court found that those laws serve legitimate state interests. App. 55, 59. They protect the commercial reputation of Indiana products, protect those who come in contact with those products from health risks of an unknown magnitude, and provide greater accountability for compliance with Indiana's system of solid waste regulation. App. 53-55, 57-59.

The question presented is whether these statutes nevertheless violate the dormant Commerce Clause, principally on the theory that the laws have a "disparate impact" on interstate businesses because of their preferred methods of operation. At bottom, this case squarely presents the question of just what constitutes "discrimination" under the Commerce Clause. Contrary to the Seventh Circuit's "disparate impact" theory, the Commerce Clause does not require States to exempt interstate transactions from laws of general application.

In opposing certiorari, respondents have illustrated the need for clarification in this area of the law. They repeatedly and mistakenly treat this Court's decisions involving State laws that facially discriminate against commerce crossing State (or local) boundaries as cases of "discriminatory effect." Respondents also oppose certiorari with a challenge to petitioners' motives that the district court rejected as immaterial and the court of appeals did not address. Because the district court made no findings on that disputed factual issue, respondents' argument is not properly before this Court. Finally, respondents try to reframe the issues by repeatedly asserting, contrary to the undisturbed findings of the district court, that the challenged laws do not serve legitimate State purposes. As shown in the Petition and this Reply, this Court should grant certiorari both to guide the lower courts as to what is "discrimination" under the dormant Commerce Clause, and to clarify the Commerce Clause standards that apply to facially neutral State laws that serve legitimate State purposes.

I. THIS COURT'S DECISIONS STRIKING DOWN FACIALLY DISCRIMINATORY STATUTES NEITHER RESOLVE THE ISSUE PRESENTED BY THE PETITION NOR SUPPORT THE DECISION BELOW.

Relying on three decisions of this Court, respondents argue that "discriminatory effect is a well-settled basis for applying elevated scrutiny" under the Commerce Clause. Resp. Br. at 13. All three involved a State law that, on its face, treated waste differently depending on whether it crossed a State or local boundary. In *Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978), the challenged law simply banned garbage imports across the State border. Discrimination against interstate commerce could not be any clearer and was never at issue.

In *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. ___, 112 S. Ct. 2009, 119 L. Ed. 2d 121, 132 (1992), the State law imposed a prohibitive fee only on waste that crossed the State boundary. Again, the facial discrimination was not disputed. In *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. ___, 112 S. Ct. 2019, 119 L. Ed. 2d 139 (1992), the law banned garbage imports across county lines. Following *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951), this Court held in *Fort Gratiot* that facial discrimination based on local boundaries also discriminates against interstate commerce and is subject to elevated scrutiny. 119 L. Ed. 2d at 149.

Although all three cases dealt with waste disposal, they offer no guidance in this case for the simple reason that all three involved facially discriminatory statutes. Such discrimination is the principal object of the dormant Commerce Clause. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987). This Court has not extended heightened scrutiny to State laws that impose the same rules on local and interstate commerce, even where, as a result of some businesses' preferred methods of operation, the laws affect interstate businesses more heavily than local ones. *See CTS*, 481 U.S. at 88. This Court has never imposed elevated scrutiny on facially neutral laws found to serve legitimate State purposes.

II. THE CIRCUIT SPLIT ON THE "DISPARATE IMPACT" QUESTION SHOULD BE RESOLVED.

When "disparate impact" claims of discrimination have been presented to this Court under the dormant Commerce Clause, this Court has rejected them. Petition at 12-15. However, in some cases involving facially discriminatory laws, this Court has used language that can be read as inviting the "disparate impact" analysis the Seventh Circuit used here. The tension between this Court's holdings and its language in other cases has produced a conflict among the circuits and a clear request from the lower courts for further guidance on what constitutes discrimination under the Commerce Clause.

Respondents deny that the circuit split exists, yet they mention only the Third Circuit's decision in *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 400 (3d Cir. 1987), and they fail to explain how that case could be reconciled with the Seventh Circuit's decision in this case. They do not even address the decisions of the Ninth, Eleventh, Second, and First Circuits that rejected "disparate impact" claims of discrimination. *See* Petition at 16.

Respondents' only explanation seems to be that this Court provided the needed guidance last term in *Fort Gratiot* and *Chemical Waste Management*, and they mistakenly claim that the law in *Fort Gratiot* was "facially neutral" when it was actually discriminatory on its face. *Compare* Resp. Br. at 23, *with* 119 L. Ed. 2d at 148-49. Both cases dealt with laws that imposed different rules on commerce depending on whether it crossed a State or local boundary. Neither opinion offers guidance on the question whether and under what circumstances a facially neutral law -- one imposing the same rules on local and interstate commerce -- can be treated as discriminatory. Thus, clarification and guidance are still needed to resolve the conflict.

III. RESPONDENTS HAVE FAILED TO EXPLAIN AWAY THIS COURT'S COMMERCE CLAUSE DECISIONS REJECTING DISPARATE IMPACT CLAIMS OF DISCRIMINATION.

In *CTS Corp. v. Dynamics Corp. of America*, *supra*, 481 U.S. at 88; *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 619 (1981); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-72 (1981); and *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125 (1978), this Court expressly rejected claims that facially neutral statutes discriminated against interstate commerce based on a "disparate impact" theory. Respondents have tried to explain away *CTS* and *Exxon*, apparently relying on a distinction they see between "discriminating against articles in commerce themselves, as opposed to regulating the structure of entities conducting the commerce." Resp. Br. at 21. They suggest that *CTS* was decided on the ground that the "burden of the state's regulation fell not on the article of commerce itself, but rather upon those most likely to attempt a hostile takeover who this Court assumed resided out-of-state." *Id.* at 22.

Frankly, petitioners do not understand this proposed distinction. But whatever it means, *CTS* offers not the slightest support for it, and petitioners are aware of no support for it in this Court's long history of Commerce Clause decisions. The proposed distinction between the "article of commerce" and those engaged in commerce seems to suggest that the Commerce Clause grants rights to shares of stock, loads of coal, milk jugs, and garbage bales, but not to citizens engaged in interstate commerce. *Cf. Dennis v. Higgins*, 498 U.S. ___, 111 S. Ct. 865, 112 L. Ed. 2d 969, 977-80 (1991) (Clause confers "rights" within meaning of § 1983).

IV. RESPONDENTS' ATTACK ON THE STATE'S MOTIVES IS IMMATERIAL AND RAISES A LEGAL ISSUE NOT PRESENTED BY THIS CASE.

The district court correctly held the Indiana backhauling and vehicle registration laws are facially neutral and upheld them because they will serve legitimate State purposes. In this Court, as

in the district and circuit courts, respondents try to undermine the neutral laws by attacking the subjective motives of petitioners, claiming that the facially neutral laws were motivated by a desire to stop garbage imports into Indiana rather than to gain the benefits found by the district court.

This case does not present any motive issue. After hearing conflicting evidence on the issue, the district court correctly ruled that the question of subjective motives or expectations was immaterial under the Commerce Clause. The court therefore made no findings on that disputed question of fact and applied an objective test under the Commerce Clause. App. 51, following *Government Suppliers Consolidating Services, Inc. v. Bayh*, 753 F. Supp. 739, 769 (S.D. Ind. 1990), and cases cited therein; *accord*, *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968)(rejecting motive test under First Amendment); *Kassel v. Consolidated Freightways, Inc.*, 450 U.S. 662, 702-03 (1980)(Rehnquist, J., dissenting) (rejecting motive inquiry under Commerce Clause).

The Seventh Circuit did not base its decision on motive, but respondents rely on its comment that "the 'circumstances of enactment suggest that it was the principal objective' of the statutes to impede importation of trash." App. 19. With all due respect, to the extent that comment purported to resolve a disputed factual issue about which the district court made no findings, it was not appropriate. Petitioners presented evidence showing that the only reasons the legislature considered were precisely those found by the district court -- *i.e.*, protection of commercial reputation and public health, and better accountability and enforcement of Indiana's entire system of solid waste regulation. Respondents presented no evidence about the motives of any member of the Indiana legislature, but claimed that petitioners Bayh and Prosser supported these laws as part of a campaign to stop waste imports. The evidence showed that Bayh and others sought *Congressional* authority to restrict garbage imports, but those entirely proper efforts cannot taint the constitutionality of these facially neutral laws that serve legitimate State purposes.

V. RESPONDENTS' ARGUMENTS UNDER THE *PIKE* TEST ARE NOT BASED ON THE RECORD OR THE DISTRICT COURT'S FINDINGS.

The Seventh Circuit erred by substituting its legislative and economic judgments for those of the Indiana legislature when it applied the balancing test stated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Petitioners need to correct a number of assertions respondents make about the district court's findings, especially those concerning the benefits and burdens of the laws.

On the benefit side of the scales, the district court expressly found that the backhauling law "protects the reputation of Indiana goods," and that the conflicting evidence on health risks allowed the legislature to determine that backhauling posed health risks. App. 55. Respondents' claims notwithstanding, the benefits were not "*post hoc* justifications," and the evidence on commercial reputation was so substantial that additional evidence was excluded as cumulative. App. 41. After hearing the conflicting evidence on health risks, the district court correctly ruled that the legislature "is not required to wait for scientific verification and the publication of learned articles," and that the legislature was "well within its rights to determine that backhauling posed health risks." App. 53-55. *Accord*, *Maine v. Taylor*, 477 U.S. 131, 148 (1986) (State need not sit idly by until damage has occurred or until scientific community agrees on danger). Nor did the district court ever find that the public's or the State's concerns supporting the law were irrational.

On the burden side, the district court did *not* find, as respondents claim, that the backhauling law would stop garbage imports into Indiana. It found that the cost of disposing of garbage in Indiana would go up, and that Indiana would no longer be the cheapest State for the disposal of respondents' garbage. App. 55. But "[l]ower profits do not constitute a clearly excessive burden on interstate commerce in relation to these obvious benefits." *Id.*

Moreover, the district court did not find that respondents' preferred methods of operation were the only practical way to import garbage. The court found that flat bed trailers and "dump trailers" are also used for waste shipments. App. 43. The

evidence showed that such trailers were suitable for handling materials exempt from Indiana's backhauling law, that many other commodities are already shipped on dedicated fleets, and that dedicated fleets exist for long-distance shipments of municipal waste. Moreover, on the eve of the backhauling law actually taking effect, out-of-state entities had registered thousands of vehicles to transport and dispose of waste in Indiana. *See* Petition at 7 n.5.

The benefits of the vehicle registration and labeling law include providing shippers with information they want, and helping Indiana enforce its other solid waste laws through greater accountability for those in the waste business, in addition to enforcing the backhauling law itself. App. 59. On the burden side, the district court rejected the suggestion that forcing truckers to tell their customers that their trucks had hauled garbage could be a cognizable burden on commerce. App. 57-58.[1]

The Seventh Circuit did not hold any district court finding to be clearly erroneous. Rather, it first analyzed the findings and evidence under the exacting standards applied to facially discriminatory statutes and found these statutes did not satisfy that stringent test. App. 21-25. When it shifted to the *Pike* test, the Seventh Circuit again did not reverse any finding as clearly erroneous, but borrowed most of its earlier analysis under the elevated scrutiny test. It asserted that Indiana should not "bow[ ] to unreasoned public opinion" threatening the reputation of Indiana products, that Indiana had no interest in the health of citizens of other States who receive Indiana products, and that Indiana should rely on "market forces alone" to protect its interests. App. 33-34, 22-23.

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[1]Respondents also suggest that the vehicle registration and labeling law is "extraterritorial." Resp. Br. at 26-27. Respondents waived this claim below by raising it for the first time in their post-trial reply brief, and neither the district court nor the court of appeals addressed it. In any event, the claim is meritless. Indiana's law does not purport to control conduct occurring wholly outside its borders.

After substituting its judgment on these matters for that of the Indiana legislature, and after finding that Indiana could have served its interests better with an even broader law, App. 33-34, the Seventh Circuit held that the Indiana laws fail the *Pike* balancing test. The *Pike* test was not intended to authorize such exacting scrutiny of evenhanded State legislation, and this Court has not used it that way. Accordingly, this Court should also grant certiorari to clarify that *Pike* does not allow such judicial policymaking under the Commerce Clause.

CONCLUSION

This case squarely presents on a full record the question whether a facially neutral State statute that serves legitimate purposes can be struck down as discriminatory under the dormant Commerce Clause. The issue deserves this Court's plenary review because of the conflicting signals from this Court, the conflict in the circuits, and the lower courts' request for guidance. The dormant Commerce Clause does not protect the preferred business practices or current profit margins of interstate businesses, nor does it authorize the degree of federal intrusion into a State's police power exhibited in the Seventh Circuit's decision. This Court should therefore issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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